IKEH LANTAI

v.

MICHAEL TALIBAN

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL RAHMAN SEBLI JC
[SUIT NO: K22-86-2007]
22 APRIL 2009

CIVIL PROCEDURE: *Striking out - Statement of defence - Appeal against - Whether deputy registrar had power to strike out defendant's statement of defence and entering judgment against defendant - Rules of the High Court 1980, O. 25*

This was the defendant's appeal against the decision of the deputy registrar ordering that the defendant's statement of defence be struck out and judgment entered against him. The issue was whether the deputy registrar had power to strike out the defendant's statement of defence and entering judgment on the sole ground that counsel for the defendant was absent when the case was called up for hearing in an application under O. 25 Rules of the High Court 1980 (the Rules). It was contended for the defendant the deputy registrar had no jurisdiction to strike out the defence and to enter judgment as his power under O. 25 of the Rules was restricted to giving directions in preparation for the trial.

Held (dismissing defendant's appeal):

(1) The deputy registrar had not exceeded his powers in striking out the defence and entering judgment against the defendant. Litigants must ensure that they prosecute their cases earnestly and this included being present every time their cases were called. If they have appointed solicitors to represent them it was their duty to make sure that their solicitors were present in court when their cases were called. Solicitors act on their instructions. As such they must bear the consequences if their solicitors were negligent. Their remedy lay in taking action against the solicitors if they suffered any loss as a result of such negligence. (para 8)

(2) As for the counsels, they owe a duty not only to their clients but also to the court. They are not at liberty to absent themselves from attending court hearings without valid reasons. It did not matter that the case was only for mention, for summons for direction or for full hearing. Every stage of the case is important. Their duty as counsels dictated that they must be present in court on the appointed dates and to continue to be present until the cases were concluded. If they were unable to attend court for valid reasons they should inform the court accordingly or simply instruct another solicitor to mention on their behalves instead of not showing up. (para 9)

(3) Being an officer of the court, it was the counsel's duty to ensure that court proceedings were conducted smoothly and not disrupted by his absence. The matter could not be taken lightly as counsel's absence would result in a postponement of the case if the court was not minded to make an order adverse to the absent party. It was not only being disrespectful to the court but was also an abuse of the court process bordering on contempt. (para 12)

Case(s) referred to:

Huang Yan Teo v. Low Nam Hui & Sons Sdn Bhd [2007] 5 CLJ 654 HC ***(refd)***

Lee Shu Tuck & Ors v. Tom Manas Incorporated Sdn Bhd & Anor [1999] 1 CLJ 526 HC ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 CA ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 25, O. 32 r. 9, O. 92 r. 4

For the plaintiff - Trevor Kenneth Maringking; M/s Maringking & Co
For the defendant - Arthur Bonnie; M/s Jack Arthur & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli JC:

[1] This is the defendant's appeal against the decision of the deputy registrar ordering that the defendant's statement of defence be struck out and judgment entered against him. The issue is whether the deputy registrar had power to strike out the

defendant's statement of defence and entering judgment on the sole ground that counsel for the defendant was absent when the case was called up for hearing in an application under O. 25 of the Rules of the High Court 1980 (the Rules). Order 25 of the Rules relates to a summons for direction.

[2] It was contended by counsel for the defendant that the deputy registrar had no jurisdiction to strike out the defence and to enter judgment as his power under O. 25 of the Rules was restricted to giving directions in preparation for the trial.

[3] The brief chronology of events is as follows. The summons for direction was initially fixed for hearing on 25 October 2007. On that date counsel for the defendant failed to turn up and the case was postponed to 30 November 2007. No reason was given for the absence. The defendant's counsel was notified of the new date by fax by the plaintiff's counsel on 25 October 2007. However the defendant's counsel claimed that he was not aware of the letter. The solicitor had since withdrawn himself from representing the defendant and the case is now handled by his present solicitor. The defendant had earlier been told by his former solicitor to file a notice to act in person as he was no longer representing him. It was when the defendant wanted to file the notice to act in person on 27 November 2007 that he (the defendant) was informed that the case had been struck out on 30 October 2007. Apparently no solicitor appeared for the defendant on 30 October 2007.

[4] Counsel for the plaintiff pointed out that the defendant had not disclosed the true facts as to why his counsel was not present at the hearing of the O. 25 application on 25 October 2007. It was further pointed out that the defendant's counsel was aware that the summons for direction was fixed on 25 October 2007 and was also notified of the adjourned date, ie, 30 October 2007.

[5] The powers of the registrar are conferred by O. 32 r. 9 of the Rules in the following terms:

> The Registrar shall have power to transact all such business and exercise all such authority and jurisdiction as under the Act or these rules may be transacted and exercised by a Judge in Chambers except such business, authority and jurisdiction as the Chief Justice may from time to time direct to be transacted or exercised by a Judge in person or as may by any of these rules be expressly directed to be transacted or exercised by a Judge in person.

[6] In *Lee Shu Tuck & Ors v. Tom Manas Incorporated Sdn Bhd & Anor* [1999] 1 CLJ 526 Abdul Aziz Mohamed J held, *inter alia*, that unless the court rules are changed the decision of the registrar is the decision of the High Court. Similarly in *Huang Yan Teo v. Low Nam Hui & Sons Sdn Bhd* [2007] 5 CLJ 654 Syed Ahmad Helmy J held that registrars do have jurisdiction to hear and determine applications for judgment in an action for specific performance unless and until the statutory provisions are changed to provide otherwise or the Chief Justice directs that such business may not be transacted by the registrar. There is at the present time no direction from the Chief Justice that only a judge may exercise the power to enter judgment in default of appearance in a proceeding under O. 25 of the Rules.

[7] Further by virtue of O. 92 r. 4 of the Rules the deputy registrar is vested with wide inherent powers to make any order as may be necessary to prevent injustice or to prevent an abuse of the court process. Order 92 r. 4 reads as follows:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent power of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court

[8] In my view the deputy registrar had not exceeded his powers in striking out the defence and entering judgment against the defendant. I had therefore dismissed the defendant's appeal. Litigants must ensure that they prosecute their cases earnestly and this includes being present every time their cases are called. If they have appointed solicitors to represent them it is their duty to make sure that their solicitors are present in court when their cases are called. Solicitors act on their instructions. As such they must bear the consequences if their solicitors are negligent. Their remedy lies in taking action against the solicitors if they suffer any loss as a result of such negligence.

[9] As for counsels it is trite to say that they owe a duty not only to their clients but also to the court. They are not at liberty to absent themselves from attending court hearings without valid reasons. It does not matter that the case is only for mention, for summons for direction or for full hearing. Every stage of the case is important. Their duty as counsels dictates that they must be present in court on the appointed dates and to continue to be present until the cases are concluded. After all that is what they are engaged for. If they are unable to attend court for valid

reasons they should inform the court accordingly or simply instruct another solicitor to mention on their behalves instead of not showing up. A

[10] Instances of counsels absenting themselves or coming late to court without any or any valid reason resulting in the court waiting for their arrivals are not uncommon. Of course the court is not obliged to wait for counsels. It is done if only to avoid being unduly harsh and unreasonable. Even as I was writing these grounds counsel in an *ex parte* chambers application (*ex parte* Originating Summons No. K24-43 of 2009) had not shown up although the time was already 9.50am (the case was fixed for hearing at 9am). As it turned out he never did turn up for the case. B C

[11] Counsels cannot expect the court to wait for them without knowing when they are coming or if they are coming at all. For the record I have struck out the *ex parte* Originating Summons with liberty to file afresh when there was no sign of counsel by 10am. This may cause inconvenience to the litigant not to mention the costs involved but that is the price he must pay for failing to ensure that his solicitor was present in court. The court cannot allow his solicitor to be absent with impunity. D E

[12] Being an officer of the court it is counsel's duty to ensure that court proceedings are conducted smoothly and not disrupted by his absence. The matter cannot be taken lightly as counsel's absence will result in a postponement of the case if the court is not minded to make an order adverse to the absent party. It is not only being disrespectful to the court but is an abuse of the court process bordering on contempt. This irresponsible act must stop. F G

[13] The plaintiff in his affidavit in opposition affirmed on 5 May 2008 has also brought to the court's attention the defendant's contemptuous behaviour after the order was made by the deputy registrar. Despite the court order the defendant purported to transfer the disputed land to his wife Suzie binti Lompoh who is not a native of Sabah. And in total defiance of the court order Suzie binti Lompoh went on a rampage by destroying the plaintiff's house and other properties on the land two days after the court order. The plaintiff's house was razed to the ground and smoke was still simmering from the ashes as can be seen from the photos exhibited in the plaintiff's affidavit in opposition. H I

A **[14]** According to the plaintiff Suzie binti Lompoh is now in the midst of preparing to build a house on the land despite knowing that the present appeal was pending before the court. All these assertions are not traversed by the defendants and are therefore deemed to be admitted: *Ng Hee Thoong & Anor v. Public Bank*
B *Berhad* [1995] 1 CLJ 609. These may not be relevant to the issue as rightly pointed out by counsel for the defendant but they are relevant to show that the defendant has not come to this court with clean hands in pursuit of his legal remedy.

C

D

E

F

G

H

I